

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON
TRANSCRIPT OF PROCEEDINGS

IN RE: ETHICON, INC., PELVIC REPAIR MDL NO.
SYSTEM PRODUCTS LIABILITY LITIGATION 2:12-MD-2327

TELEPHONIC STATUS CONFERENCE

September 30, 2013

BEFORE THE HONORABLE CHERYL A. EIFERT
UNITED STATES MAGISTRATE JUDGE

Court Reporter: Lisa A. Cook
RPR-RMR-CRR-FCRR
(304) 347-3198
lisa_cook@wvsc.uscourts.gov

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES

(By Telephone)

For the Plaintiffs:

MR. BRYAN F. AYLSTOCK
MS. D. RENEE BAGGETT
Aylstock, Witkin, Kreis & Overholtz
Suite 200
17 East Main Street
Pensacola, FL 32502

MR. THOMAS P. CARTMELL
Wagstaff & Cartmell
Suite 300
4740 Grand Avenue
Kansas City, MO 64112

MR. BENJAMIN H. ANDERSON
Anderson Law Offices
Suite 215
360 West 9th Street
Cleveland, OH 44113

For the Defendant:

MR. WILLIAM M. GAGE
MR. BENJAMIN M. WATSON
MS. DONNA B. JACOBS
Butler, Snow, O'Mara, Stevens & Cannada
P.O. Box 6010
Ridgeland, MS 39158-6010

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES

(Continued)

For the Defendant:

MR. PHILIP J. COMBS
Thomas, Combs & Spann
P.O. Box 3824
Charleston, WV 25338-3824

MR. GARY A. RUBIN
Skadden, Arps, Slate, Meagher & Flom
1440 New York Avenue, N.W.
Washington, D.C. 20005

1 P R O C E E D I N G S

2 THE CLERK: Could you identify plaintiffs' counsel
3 first and then defense counsel, please.

4 MR. AYLSTOCK: Sure. This is Bryan Aylstock on
5 behalf of the plaintiffs.

6 MS. BAGGETT: Renee Baggett on behalf of the
7 plaintiffs.

8 MR. CARTMELL: Tom Cartmell on behalf of the
9 plaintiffs.

10 THE CLERK: Anyone else for the plaintiffs? Is
11 there anyone else on the line for plaintiffs' counsel?

12 MR. ANDERSON: Ben Anderson.

13 THE CLERK: All right. Thank you.

14 What about defense counsel, please?

15 MR. GAGE: For the defendants Donna Jacobs, Ben
16 Watson, and William Gage.

17 THE CLERK: All right. Thank you very much. Hold
18 one moment.

19 MR. COMBS: And Phil Combs for the defendant.

20 THE CLERK: Oh, all right. Thank you.

21 MR. RUBIN: And Gary Rubin from Skadden Arps for
22 the defendant.

23 THE CLERK: Gary Rubin did you say?

24 MR. RUBIN: Yes, ma'am.

25 THE CLERK: All right. Thank you. Is there

1 anyone else?

2 (No Response)

3 THE CLERK: All right. Hold one moment for Judge
4 Eifert, please.

5 THE COURT: Hello. How are you-all?

6 Lisa Cook is our court reporter today. Once again,
7 I'll remind you to identify yourself when you speak so she
8 can get that correct, put it down correctly in the record.
9 All right?

10 Okay. I have two things on my agenda today, and then
11 I'll turn it over to you-all.

12 The first has to do, once again, with the supplemental
13 sweeps of the custodial files. The way we left it I think
14 last week, or a week from last Friday, was that there had
15 been a proposal made by the defendants that had been
16 provided to the plaintiffs.

17 The plaintiffs had reviewed it cursorily and felt that
18 perhaps the, the 21 -- they wanted 21 days instead of 30
19 days prior to depositions to have those produced.

20 Is that -- am I understanding correctly what was said
21 last time?

22 MR. GAGE: Your Honor, this is William Gage.

23 Bryan and I ultimately talked and I think we came down
24 with what we agreed to was 65-25, meaning they would give us
25 65 days notice of the depo and we would provide the

1 documents within 25 days of the depo.

2 And I sent Bryan the revised stip just a few minutes
3 ago. It's got a couple of other things in it that departed
4 from the original stip, but these were issues that were
5 discussed in several calls I had with Bryan and/or Tom this
6 past week.

7 So, I think on the 65-25 issue, I think we've got a
8 deal.

9 THE COURT: Is that correct, Mr. Aylstock?

10 MR. AYLSTOCK: Well, on that issue I think that's
11 correct with this caveat. As, as Your Honor will recall,
12 there was a representation made to the Court that custodians
13 have been swept and produced, a couple hundred, in fact.
14 And where a deponent that we want is, you know, part of that
15 prior custodial production, unless there's some need to
16 supplement that production, you know, I, I -- we -- given
17 the time pressures we have and, and how long some of these
18 have been outstanding, I think that what I -- and I did
19 literally just get the stipulation a minute ago from, from
20 William.

21 What I would say is that if it's somebody on the
22 custodial production list, then we don't need 65 days. We
23 don't need 21 days. Certainly, we want a representation
24 that, that that file has been completely produced. But I
25 don't want to get jammed up with the -- or hung up on the

1 65-day part of it because certain witnesses we've been, you
2 know, were already swept, I guess. And then there's some
3 other things that are brand new to me in this stipulation
4 that William and I didn't discuss.

5 So, I guess sort of is, is -- it's a long way of saying
6 sort of, Your Honor.

7 THE COURT: All right.

8 MR. GAGE: Your Honor, this is, this is William
9 Gage.

10 I, I think what Bryan is referring to, he and I talked
11 this past week about the reality that, you know, some of
12 these people that they want to take the deposition of, their
13 custodial files would have been updated, swept, et cetera,
14 you know, sometime like in May of 2012 or maybe the end of
15 2012 or early 2013 such that there's been more than six
16 months pass since they were last swept.

17 But the reality is there, there may be instances where
18 the plaintiffs are willing to go forward with the depo
19 without having to do another supplemental custodial sweep.
20 And that's largely because some of the witnesses, you know,
21 it's really not that important what they may have about
22 e-mailing about or speaking about or working on in the year
23 2013 because some of these witnesses, the, the relevant time
24 frame may be years earlier.

25 So, I think that's where Bryan and I were trying to go,

1 that we would not try to have such a long depo notice period
2 in every instance. We would try to work and hopefully have
3 some cases where, you know, we don't need to do a
4 supplemental sweep for a particular deponent.

5 MR. AYLSTOCK: That's correct, Your Honor. I just
6 don't, you know, I don't want the record to reflect that,
7 you know, we agreed that we're going to need, or, or give 65
8 days notice before every single deposition because there are
9 certain things we're learning even now that, okay, this
10 guy's a key person or this gal's a key person. And with the
11 trial upon us, some of these very well may need a shorter
12 fuse. So, that, that's my concern there.

13 THE COURT: Well, I will let you both try to
14 address this further on your own. It sounds to me that at
15 least the issue's been raised and that Mr. Gage is trying to
16 get these sweeps done prior to the deposition. So, I think
17 that's maybe the best we can do on that today.

18 The other item I had was a follow-up on
19 Dr. Klosterhalfen's histological report and the production
20 of those reports. Have we made any, any progress on that?

21 MR. ANDERSON: Your Honor, this is Ben Anderson.

22 Pursuant to your, our discussion last week, we had
23 reached out to Dr. Klinge. And then we had also reached out
24 to Dr. Klosterhalfen to say, "Please send me anything that
25 you have that's related to your consulting period with

1 Ethicon."

2 And, so, -- and I asked them to make reasonable
3 inquiries into their documents, realizing that some of this
4 work goes back more than 20 years that they did with
5 Ethicon. And, so, I -- we have various changes of computers
6 since then. I know I certainly have had a few different
7 laptops, and sometimes back then didn't have a computer at
8 all in the '90s. And, so, they are making reasonable
9 inquiries into those documents.

10 I have, in fact, received a few documents from Dr.
11 Klinge already that -- as he is trying to look through and
12 see what is relevant.

13 And, so, from, from the plaintiffs' end, yes. I don't
14 know what the defendants have done on their end to look for
15 some of the things that we discussed that they were going to
16 simultaneously be trying to find with regard to Drs. Klinge
17 and Klosterhalfen.

18 Since we spoke last Friday, I did get a stipulation, a
19 proposed stipulation from the defense. And it was different
20 than what we had discussed in our previous phone calls. And
21 it was asking for all of the documents to be collected by
22 Drs. Klinge and Klosterhalfen, and that they take this
23 plug-in device with a, with a drop-down kit, a witness
24 self-collection kit and plug it into their computers and
25 begin to take down electronically stored information.

1 Furthermore, they wanted it produced not to me, but
2 produced only to the defense so that they could, I guess,
3 vet it and run it through their channels before they decided
4 what they would produce to us.

5 And, of course, I was following the Court's instruction
6 and, and as, as Your Honor had said last week. So, I think
7 if you can get the documents from Dr. Klosterhalfen that
8 pertain to Ethicon, Mr. Gage is telling you Ethicon doesn't
9 care. Go ahead and get them. I think you ought to try to
10 get them.

11 So, I did that for both he and Dr. Klinge. I had
12 previously asked Dr. Klinge and made it more clear to him
13 what it was that I was asking because I don't think he quite
14 understood that this is documents that went between he and
15 Ethicon back in the day to, to and from. And, so, I know
16 that Dr. Klosterhalfen is looking for anything that relates
17 to documents.

18 Also in this stipulation, despite the fact that I had
19 informed Your Honor and I had informed the defense that
20 Dr. Klosterhalfen, nor Klinge, per German law, introduce
21 medical records, patient information, they can't produce
22 actual explanted tissue. That is not allowed for them to do
23 that. This came up in the *Bard* litigation as well. The
24 Judge did not make him produce those things. Yet, they have
25 included it in their stipulation.

1 So, I responded at length to Mr. Gage and gave him all
2 of the reasons that I thought that the stipulation was not
3 appropriate and it was not in keeping with what we had
4 discussed with Your Honor, and went into that in some detail
5 and indicated that we would be -- we've made good faith
6 efforts to collect these. And as we collect them, I even
7 offered if he wanted me to create a drop box folder, I could
8 put those in that, or I could send them to him as I receive
9 them, whatever he would like.

10 And, of course, we will treat them with the same
11 confidentiality that we would as with any document that's
12 been produced in this litigation.

13 So, I thought that I was, A, following the Court's,
14 Your Honor's instructions; B, doing what was reasonable and
15 necessary to comply, while at the same time not agreeing to
16 a stipulation which seems to be, at a minimum, overly
17 burdensome and causing these experts to try to, you know,
18 begin to put on their personal computers or other computers
19 some sort of kit that would download information and be sent
20 directly to Ethicon. I don't believe that that's
21 reasonable, nor something that's warranted, nor something
22 that we should have to do.

23 THE COURT: Mr. Gage, that's a little bit
24 different than what I understood you to say at the last
25 conference. I thought your position was if the, if these

1 reports existed, that they should go ahead and get them from
2 Dr. Klosterhalfen since he had possession of them, and you
3 maybe did not have possession of them. And, at the same
4 time, you were going to look for what Ethicon had from
5 Dr. Klosterhalfen.

6 So, it sounds like somehow we got a little off, off the
7 road there.

8 MR. GAGE: Your Honor, this is William Gage.

9 There are two -- there are two issues here.

10 The first issue is, concerns a proposed stipulation
11 that we sent to Mr. Anderson regarding both
12 Dr. Klosterhalfen and Dr. Klinge.

13 Your Honor will recall that Dr. Klosterhalfen is a
14 non-retained expert designated by the plaintiffs. And Dr.
15 Klinge is a retained expert designated by the plaintiffs.

16 The stipulation that we prepared and sent to the
17 plaintiffs last week is a stipulation that sets forth a
18 proposal for how the two witnesses, both of whom are Ethicon
19 consultants, would gather and produce to Ethicon the
20 documents, e-mails, and other related materials that arise
21 out of their former consulting relationship with Ethicon.

22 Your Honor may recall that on a prior call or two we
23 had pointed out to the Court that we would, we would want to
24 be taking these individuals' depositions both as a fact
25 witness in terms of their prior service as a consultant to

1 Ethicon and then, secondly, a, some time for their expert
2 depositions since they've both been scheduled as experts
3 against Ethicon.

4 So, the stipulation is a, is a document that proposes a
5 protocol for how we would go about getting those documents.

6 The second issue, Your Honor, relates to a very narrow
7 subset of documents that Mr. Anderson requested a few calls
8 ago, and certainly in an e-mail to us. And those are the
9 Klosterhalfen explant reports.

10 Your Honor may remember when we discussed this last
11 week, we, we -- the parties agreed to do two things with
12 Your Honor's guidance.

13 One is Ethicon would continue to look internally to see
14 if they could find these reports. And just to remind Your
15 Honor, this is when a patient would have a piece of mesh
16 taken out of their body. The doctor would send the mesh to
17 Ethicon. Ethicon would then send the mesh to
18 Dr. Klosterhalfen, who was then a consultant for the
19 company. And Dr. Klosterhalfen would look at the mesh and
20 then send a report back to the company.

21 So, with regard to those explant reports, I received an
22 e-mail about two hours ago from our team in Germany. We
23 dispatched, Your Honor, some lawyers to go to Germany to
24 look for this document, these documents among others.

25 And our team met early -- well, it would be early this

1 morning for us. I guess it would be late afternoon for
2 them. But our team met with a lady in Germany at the
3 Ethicon facility there. Her name is Anke, A-n-k-e, Winter.

4 And she reported that -- she's the individual that --
5 when I indicated last week that we had a lead on somebody,
6 she's the individual that we had a lead on. But she was out
7 last week on vacation. So, we met with her early this
8 morning. I was not part of the meeting. Our team in
9 Germany was.

10 They, they believe that over the years,
11 Dr. Klosterhalfen may have provided about 50 such reports
12 following his review of mesh explants. And she identified
13 several places where if the documents exist, they might be
14 located. So, she's identified a Remetrex system, an Excel
15 file, and perhaps some hard copy files.

16 So, our team in Germany is now looking to go through
17 these sources to see if we can find those very specific
18 documents.

19 Now, Your Honor, the -- I think the place where in
20 terms of, of perhaps an action item for the Court, if we go
21 back to the stipulation -- and the stipulation would govern
22 not only these explant reports, but any other documents that
23 Drs. Klinge or Klosterhalfen would have created in
24 conjunction with their consultation agreement with Ethicon.

25 I believe that the stipulation or the proposal that we

1 put forward, the plaintiffs have raised a number of
2 objections to those, to our proposal. And we can go through
3 the various objections and go through the various details
4 of, for example, the e-discovery self-collection kit which
5 we proposed. If, if Your Honor wants to hear more about
6 that, Mr. Rubin is on the phone for Ethicon. He can help
7 guide Your Honor through what that entails.

8 But at -- however Your Honor wishes to proceed, I
9 would, I would say this. I think that probably the parties
10 are pretty far apart on the manner and process that should
11 be followed for retrieving these documents in the hands of
12 Drs. Klinge and Klosterhalfen which we believe are subject
13 to these consulting contracts.

14 And, so, I think at the end of the day, Your Honor may
15 end up just having to tell us to submit our various
16 proposals because at the end of the day, I think both sides
17 agree the need to get this document issue resolved is pretty
18 imminent if we're going to get the documents turned around
19 and produced prior to their depositions in November.

20 So, with that, I'll be quiet and just let Your Honor
21 tell me where you'd like to go.

22 MR. ANDERSON: May I respond to that, Your Honor?

23 THE COURT: Let me say first off, though, --

24 MR. ANDERSON: Okay.

25 THE COURT: -- I think when we were talking about

1 getting documents directly from Dr. Klosterhalfen, we were
2 talking about the histological reports of the explants only.
3 I think that's what we were talking about.

4 And I -- as I understood Mr. Gage, he didn't have a
5 problem with the plaintiffs getting copies of those reports
6 from Dr. Klosterhalfen. And, at the same time, he was going
7 to be looking for them and whatever other quality assurance
8 documents went with those histological reports.

9 Now, is that, is that correct, my understanding?

10 MR. GAGE: That is correct.

11 MR. ANDERSON: Ben Anderson.

12 That was part of it, but they had also raised the issue
13 of, "We want, we want the documents that Dr. Klosterhalfen
14 has." They weren't tailoring it to that. Perhaps it was
15 perceived that way by Your Honor. But certainly everything
16 that he does is histological in nature because he's the --
17 he was their pathologist.

18 So, everything he looked at, the documents that he
19 exchanged, the meetings that he was in over 20 years, those
20 related to material science and the histopathology as a
21 result of it.

22 THE COURT: Well, that's not what I was talking
23 about, Mr. Anderson.

24 MR. ANDERSON: Okay.

25 THE COURT: We were talking about -- we were very

1 specifically talking about those reports.

2 Now, I'm understanding today that there's a whole
3 another set of documents involving Dr. Klosterhalfen and
4 maybe Dr. Klinge that the stipulation actually applies to.

5 Is that what you're telling me?

6 MR. GAGE: Yes, Your Honor.

7 The, the -- I think the differential, where it breaks
8 down is what the plaintiffs are, are -- what, what got the
9 Klosterhalfen explant reports on Your Honor's agenda was the
10 plaintiffs' request for those documents.

11 THE COURT: Right.

12 MR. GAGE: But the defendants have a request for
13 the documents from Klinge, Drs. Klinge and Klosterhalfen
14 that are the subject of their, of their Ethicon consulting
15 agreement.

16 THE COURT: I understand.

17 Now, I did not -- I don't think it ever sunk in before
18 that Dr. Klosterhalfen was a non-retained expert. I thought
19 he had been retained in the New Jersey litigation, but
20 hadn't formally been retained in the MDL.

21 MR. ANDERSON: No, ma'am. This is Ben Anderson.

22 He was never, never in the New Jersey litigation in
23 terms of the Ethicon New Jersey litigation. And he was not
24 a retained expert, nor non-retained expert by Ethicon until
25 such time -- in, in recent weeks he was designated as an

1 expert in State Court Ethicon action. And thereafter he was
2 designated as a non-retained expert in our action. And that
3 just happened within the week before we designated, which
4 was a week ago today I guess.

5 THE COURT: So, you both have identified him as an
6 expert witness?

7 MR. GAGE: Not Ethicon.

8 MR. ANDERSON: You mean by -- by "you both," do
9 you mean Texas State Court as well as the MDL, Your Honor?

10 THE COURT: First, tell me which party has
11 identified Dr. Klosterhalfen as an expert. Is that just the
12 plaintiffs?

13 MR. ANDERSON: This is Ben Anderson. That's
14 correct, Your Honor.

15 THE COURT: And he's never been retained by the
16 plaintiffs. He's a non-retained, non-paid expert. Is that
17 correct?

18 MR. ANDERSON: In Ethicon, in Ethicon -- this is
19 Ben Anderson. That is correct, Your Honor, in Ethicon.

20 THE COURT: Okay. So, is he a paid expert in some
21 other products -- in other product litigation?

22 MR. ANDERSON: Yes, Your Honor, Ben Anderson
23 again. In the *Bard* litigation --

24 THE COURT: I see. Okay.

25 MR. ANDERSON: -- he was deposed and he was, and

1 he was also -- he went on trial at the *Cisson* case.

2 THE COURT: I see.

3 MR. GAGE: And, Your Honor, this is William Gage.

4 If, if I'm not mistaken, I believe Dr. Klosterhalfen
5 also appeared recently as an expert against Ethicon in a
6 State Court case.

7 THE COURT: All right. So, so, now, Mr. Gage, --

8 MR. GAGE: Yes, ma'am.

9 THE COURT: -- have you -- you do not have the
10 documents that Dr. Klosterhalfen has in regards to the
11 consulting agreement with Ethicon? You don't have any of
12 those documents?

13 MR. GAGE: Your Honor, we have very -- we have
14 been able to locate thus far very few Klinge and
15 Klosterhalfen like, for example, e-mails.

16 THE COURT: Uh-huh.

17 MR. GAGE: This is the subject that Mr. Anderson
18 raised with me several times. "Why do you have so few?"

19 THE COURT: Right.

20 MR. GAGE: And we are -- as part of the hernia
21 stip, Your Honor may remember -- I think we're doing some
22 additional work to find some stuff there. But --

23 THE COURT: I think I've got it now. So, --

24 MR. GAGE: We were saying -- kind of like with the
25 explant reports, we need these documents. And, so, now we

1 would like our former, our former consultants to give us
2 back our documents essentially. And, so, that was the
3 purpose of the, of the stipulation was to propose a -- and
4 because they're the plaintiffs' experts, we wanted to do it,
5 you know, under this, this joint protocol where we would
6 make a joint contact and we would give them specific
7 instructions on how to produce the documents.

8 And knowing that they're in Germany, we would provide
9 them with this self-collection kit which is, again, some
10 e-discovery stuff that Mr. Rubin can explain to Your Honor
11 if you're interested in how it, how it works.

12 But the point was to put forth a proposal to allow our
13 former consultants who are now experts against us to produce
14 to us the documents that are the subject of their consulting
15 relationship.

16 MR. ANDERSON: And, Your Honor, -- this is Ben
17 Anderson.

18 What I don't understand is we've had these document
19 requests for all documents between Ethicon and Klosterhalfen
20 and Klinge. That was in our initial requests. Why is it
21 that just now -- I ask Your Honor why is it that just now --
22 it has taken a year and a half for someone to go to where
23 they were the primary consulting, to go where they knew that
24 they were dealing the most, which is Norderstedt. Why has
25 it taken this long to find out that now we find out there

1 have been 50 reports of mesh explant?

2 That is an extraordinary amount of information because
3 within those reports, there are things like the reason for
4 the explant, was there a failure, how long was the mesh
5 implanted, what type of mesh, and what the histology showed
6 in terms of fibrotic bridging, was there contraction of the
7 mesh. There is an enormous amount of information on each of
8 those 50 patients. And that's just the ones they've
9 identified so far.

10 So, I guess from our standpoint, I believe a reasonable
11 question would be why are we getting -- I don't -- we will
12 do what the Court instructs us to do. But to ask us to
13 produce back to them now the things that we asked them to
14 produce a year and a half ago and we're just finding out
15 right now in this phone call that someone was finally sent
16 to Germany to get to the bottom of this, and I don't believe
17 that's an unreasonable request.

18 THE COURT: We're talking again -- we're mixing up
19 these -- what I see in my mind are two sort of separate
20 categories of documents. There are these histological
21 reports, which is one thing.

22 And those were the things that I understood Mr. Gage
23 really had no problem in you receiving from
24 Dr. Klosterhalfen if he had them and they don't have them.
25 But, at the same time, he was going to look for them.

1 So, that's the one category of documents. And, you
2 know, perhaps they should have been produced earlier, but
3 that's really not an issue right now. Right now is where
4 we're -- what we're going to do going forward.

5 Then there's this whole second set of documents which
6 are all the other documents that have to do with the
7 consulting relationship that Dr. Klosterhalfen and Klinge
8 had with Ethicon. And that's what the stipulation is about.

9 Is that correct, Mr. Gage?

10 MR. GAGE: Yes, Your Honor.

11 THE COURT: All right. So, the -- and I think
12 what, what I hear Ethicon saying is they don't have those
13 documents either.

14 So, you both want all of those other documents. And
15 the point of the stipulation is trying to figure out a way
16 that the doctors can produce these that is fair and
17 efficient. And that's what I think the stipulation is
18 supposed to address.

19 MR. ANDERSON: Your Honor, this is Ben Anderson.

20 It addresses that, but it addresses some other
21 evidentiary matters that are of grave concern to us as well.

22 But certainly asking, first of all, a non-retained
23 expert who is a consultant to go plugging in something to
24 where he can pull down a bunch of data off of his personal
25 computer I think is far outside of reasonable requests, as

1 well as for Dr. Klinge.

2 They, they have -- they don't have a computer that is
3 labeled, you know, Ethicon work from blank to blank. And I,
4 I don't believe that we should have to have our, our
5 experts' computers to have some sort of device that
6 downloads the data on to something to be given to the, to
7 the defense.

8 THE COURT: Well, I think that is relevant
9 information that I would assume both sides would want. And
10 I think by virtue of the fact that Dr. Klosterhalfen is in a
11 better position to know where those documents are on his
12 computer and to separate those from the things he's not
13 permitted to produce, I don't think it's unreasonable to ask
14 him to gather those things together, particularly if he's an
15 expert in this case. I think everybody has a right to
16 those, to that information.

17 MR. ANDERSON: Ben Anderson, Your Honor. We've
18 asked for that, Your Honor.

19 THE COURT: Well, they're asking for it too,
20 Mr. Anderson, because they don't have it either is what I'm
21 hearing. I don't know why they don't have it. You would
22 think they would, but they don't is what they're saying.

23 MR. AYLSTOCK: Your Honor, this is Bryan Aylstock.
24 We -- it's not a matter of, you know, us not wanting
25 the information to come out. Obviously, we do. And I, I

1 may have misheard Mr. Gage, but what I heard him say is that
2 they've just now dispatched some people to Germany to look
3 for it and they're, they're still looking.

4 And that is very disturbing to me because this is
5 clearly within all of these requests, consulting agreements,
6 the correspondence back and forth. Whatever is there is
7 absolutely within our request for production served last
8 July.

9 THE COURT: All right. But, Mr. Aylstock, Mr.
10 Aylstock, what I heard him say is they're looking for those
11 histological reports of the mesh explants, not all of these
12 other documents. Maybe I'm wrong, but that's what I heard
13 him say.

14 MR. ANDERSON: Your Honor, Ben Anderson.

15 I'd like to know that he's looking for all of it. I
16 don't know why we don't have any -- out of 20 years of
17 consulting, why do we not have more information? I just
18 don't understand.

19 THE COURT: Well, Mr. Gage.

20 MR. GAGE: Your Honor, this is Mr. Gage.

21 It is my understanding -- and I wasn't, I wasn't
22 planning on this being a particular subject of discussion.
23 I wasn't aware of this. But, to my knowledge, this, this is
24 clearly not the first time people have been sent to Germany
25 to look for documents. That's my understanding.

1 Number two, it's also my understanding that the hernia
2 stip is driving a large part of this. Your Honor will
3 remember that about, I don't know, two or three weeks ago
4 Your Honor entered an order on the hernia side that required
5 us to go pull some documents. So, that's part of what we're
6 looking at.

7 While we were over there, I asked the people to go get
8 to the bottom of this issue on, you know, talk to everybody
9 they could and figure out what's the best way -- if we can
10 find these Klosterhalfen explants, let's, let's get that
11 done.

12 So, as a by-product of the meeting, that -- of the
13 people being in Germany, that meeting got set up and I got
14 that information this morning which I just shared, Your
15 Honor.

16 So, --

17 THE COURT: Okay.

18 MR. GAGE: -- long story short is this is part of
19 a much larger effort. And I think all the implications that
20 this is the first time we've ever lifted a finger to look
21 for something in Germany is, is incorrect.

22 MR. ANDERSON: Your Honor, this is Ben Anderson.
23 Can I --

24 THE COURT: Wait a second. No, wait just one
25 second.

1 On this whole point, this is what I find to be very
2 unproductive are these conversations about how long it's
3 taken someone to collect something and when the first
4 request -- I mean, those are all subjects for a motion for
5 sanctions or a motion to compel or some other kind of
6 motion. I think complaining about how long it's taken is
7 not productive.

8 What we're trying to do now is figure out going forward
9 how can we get the documents that both sides need, and how
10 can we do this as promptly and efficiently as possible?

11 So, I, I don't want to have a -- I don't anymore want
12 to have lots of conversations about, you know, how people
13 are dragging their feet and whatnot because it just doesn't
14 help.

15 Now, having said --

16 MR. ANDERSON: Your Honor, --

17 THE COURT: Yes.

18 MR. ANDERSON: -- this is Ben Anderson.

19 We have done what Your Honor asked us to do. We
20 reached out to Professor Klinge and Professor Klosterhalfen
21 and asked them to produce to us all of the documents,
22 whether it's histo reports or anything else, related to the
23 relationship with Ethicon so that we could get this stip
24 process moving and get it done as efficiently as possible,
25 which is if you find -- when you find documents on your

1 computer or in a hard file, whatever you have, send them to
2 us so that we can immediately make sure that the defense has
3 them.

4 They still, of course, retain their rights to designate
5 them as highly confidential P, or they can later say, "This
6 is not relevant," or, "it shouldn't be in." But for right
7 now, given the time frame we have, we have these depositions
8 coming up in early November. And, so, we are trying our
9 best the best way possible to get these to us and to them.

10 And if we start asking these experts, first of all --
11 first of all, the manner of collection, and that's the
12 manner of collection, and I think it's the fastest way to
13 get it done. If we -- I don't believe that the manner of
14 collection in coercing our experts to start hooking up
15 things that Ethicon sends them to download information off
16 of a computer that then gets sent to Ethicon vetted by their
17 in-house counsel and their risk management and outside
18 counsel, and then all of a sudden we get it the night before
19 the deposition, I don't believe that's a fair and efficient
20 way to do it either, Your Honor.

21 THE COURT: Well, and it may not be. But I want
22 to make it clear that when I was speaking at the last status
23 conference, I was talking about these histological reports
24 only, the ones connected to the mesh explants.

25 I was not addressing any sort of protocol for

1 collecting the remainder of the documents pertaining to the
2 consulting relationship between Klosterhalfen, Klinge, and
3 Ethicon. So, that's a whole different subject in my mind.
4 You're talking about a whole different universe of
5 documents.

6 So, that, that is, that is what needs to be -- that's
7 what needs to be addressed. And you both -- you say that
8 you've been working on a stipulation. But do I hear you say
9 that you've reached an impasse?

10 MR. ANDERSON: Your Honor, I just got -- I didn't
11 have a stipulation. They sent me one after the last
12 conference, and they sent it to me, I guess, on Friday. And
13 I responded -- maybe they sent it on Thursday or Friday.
14 Yeah, Friday. And I responded to them Friday at 5:27
15 saying, "I see these things, but I don't agree to a number
16 of them. We can't agree to do this."

17 They asked about depositions. I sent a very lengthy
18 response to try to address each and every one of their
19 concerns. I, I offered some alternatives to the, what they
20 had proposed. And then, and then I asked them to produce
21 the things that we still had that were outstanding through
22 them like the Klosterhalfen images from PA Consulting that
23 Your Honor has heard about, and any consulting agreements
24 and anything else that they find related to Klinge and
25 Klosterhalfen.

1 So, I responded to them Friday at 5:27 and I haven't
2 seen a response to that. But certainly the stipulation as,
3 as presented to me is, is not acceptable and I don't think
4 it's reasonable. So, I'm happy to continue to work on this.

5 THE COURT: All right. So, it sounds to me like
6 you haven't reached yet an impasse. You're still talking.

7 The question is how long do you two want to talk about
8 this before you want to just submit your proposals to me and
9 let me pick one?

10 MR. GAGE: Today is Monday, Your Honor. I would
11 say maybe close of business Wednesday.

12 THE COURT: Mr. Anderson.

13 MR. ANDERSON: Wednesday is -- the entire day is
14 bad for me. I have another obligation that I have to be out
15 of town for. So, I would say probably by Friday I could
16 maybe, would be more realistic for me. We're already done
17 with Monday. So, I'm happy to -- I'm happy to do this. But
18 Friday would be more realistic.

19 THE COURT: All right. Why don't you work on it
20 and give it your best effort until Friday. And if you
21 can't -- if by Friday at, say, noon you have reached impasse
22 about particular sections of the stipulation, send to me
23 what it is you want me to look at because it sounds to me if
24 the depositions are in November, you don't have that much
25 time to, to mess around. You're going to have to get

1 something resolved.

2 MR. ANDERSON: Your Honor, Ben Anderson again.

3 May I just ask your guidance on something? I certainly
4 did not think that what we were discussing was only these
5 histopath reports, which I'm not really sure what category
6 that falls into because many of the things he did were
7 histopath reports.

8 But I'm not sure what to do now because I had requested
9 at both of them, thinking that I, I had my marching orders
10 pretty clear, to turn over the documents that were, that
11 they had between themselves and Ethicon.

12 So, I've already received some of those. I'm happy to
13 send -- collect every one that I've gotten as of this
14 afternoon and send them to Mr. Gage and the defense. But is
15 Your Honor indicating that you'd like for me to tell them
16 don't send any more?

17 THE COURT: Well, I, I definitely want you to send
18 what you received to Mr. Gage.

19 Mr. Gage, what's your position on that? Obviously, --

20 MR. GAGE: Your Honor, --

21 THE COURT: -- most of these documents are
22 obviously going to be producible.

23 MR. GAGE: Yes, Your Honor. I, I think probably
24 just to stick within the confines as much as we can of the
25 ESI protocol. I believe it would be appropriate, and I

1 would request, that the witnesses continue to collect
2 whatever they may have or preserve whatever they may have.
3 But until we work out the protocol or the Court enters one,
4 I think it would probably be best for them not to send
5 materials directly to plaintiffs' counsel.

6 I just don't know what's in there. There could be
7 something that, that my clients would say, you know, aren't
8 relevant to the litigation and, nonetheless, shouldn't be
9 given to the, to the plaintiffs' lawyers.

10 And with that fear in mind, I think it probably would
11 be best to ask them to, to continue to collect but not
12 produce to plaintiffs' counsel until we -- until Your Honor
13 enters something.

14 THE COURT: Until, until Friday anyway.

15 MR. GAGE: Yes, Your Honor.

16 THE COURT: I'm going to try to get this resolved
17 as quickly as possible.

18 So, I think, Mr. Anderson, if you would give Mr. Gage
19 what you've gotten already, then ask the doctors if they
20 would continue to collect but hold. And tell them it won't
21 be very long. We're going to have something worked out here
22 very, very shortly.

23 MR. ANDERSON: Yes, Your Honor, will do.

24 THE COURT: I think, I think the chances are,
25 Mr. Gage, that most everything they collect that has

1 anything to do with Ethicon's pelvic mesh is going to be
2 producible. So, you know, I don't know. But, in any event,
3 --

4 MR. GAGE: Likely so, Judge. Some of the
5 things -- I mean, I'm not -- you know, I don't want to
6 create problems where there may be none, but I think, for
7 example, to the extent Drs. Klinge and Klosterhalfen got or
8 created documents that indicate patient names and things of
9 that nature, even providing that to Mr. Anderson without
10 redaction could, could theoretically present a problem. So,
11 that's why I wouldn't, wouldn't -- that's one of the reasons
12 why I wouldn't want to do it.

13 THE COURT: It sounds like they won't do that.

14 MR. ANDERSON: Ben Anderson. Right, exactly, Your
15 Honor. They've already stated that they won't do that.

16 THE COURT: Yeah. They're not permitted by German
17 law apparently to do that. So, in any event, we'll go with
18 that right now. Just ask them to continue to collect, hold
19 it, and we'll get something worked out very, very shortly,
20 and then share what you already have.

21 MR. ANDERSON: Thank you, Your Honor.

22 The only, the only correction I would make is that they
23 wouldn't just be documents related to pelvic floor meshes,
24 but also, since the pelvic floor mesh is used for hernia
25 mesh and the defendants used their, the studies and things

1 from the hernia mesh to relate to the pelvic floor in their
2 IFUs and in their brochures, et cetera, that it would be --
3 we, we would -- if the documents end up going to the defense
4 before us, we would argue that those would be absolutely
5 relevant.

6 THE COURT: Well, I'm sure that your stipulation
7 covering the hernia mesh would address what's relevant and
8 what needs to be produced and whatnot. So, -- but that's
9 understood. It's not just the pelvic mesh.

10 Now, do -- who has, who has anything else they want to
11 raise for today's conference?

12 MR. AYLSTOCK: Your Honor, this is -- just real
13 quick, Judge. This is Bryan Aylstock on behalf of the
14 plaintiffs.

15 We did have on our agenda that we circulated to
16 Mr. Gage some issues with regard to deposition scheduling.
17 And I, I understood the Court to say, look, if you can't get
18 stuff worked out, then go ahead and notice some depositions
19 and then we'll deal with it.

20 There's been a few that -- of key folks that have been
21 outstanding for months, including Aaron Kirkemo, which we
22 requested in March, and Marianne Kaminski in, in May. And
23 we don't have dates from them just yet.

24 And our, our intent was simply to, to notice them, you
25 know, with sufficient time, of course, to get everybody

1 ready. Some of these are current employees, for example,
2 like Marianne Kaminski. And just go ahead and get them on
3 the calendar because we do want to get them done before the
4 trial in February.

5 THE COURT: Mr. Gage, that's, that's going to be
6 the end result. If you can't get dates to them reasonably
7 after you've received a request, then, then they have every
8 right to go ahead and notice them.

9 MR. GAGE: Yes, Your Honor. This is Mr. Gage, or
10 William Gage.

11 Judge, if I may, I have a, a -- I have one issue that
12 is a global -- kind of a global issue on deposition
13 scheduling. And if I may have Your Honor's permission, I'd
14 like to give Your Honor a series of facts about depositions.

15 And then at the conclusion of giving you those facts, I
16 have a proposal that, that we, we just kind of reached here
17 in the last day or two here internally. And we just -- we
18 need the Court's instruction on a, on the proposal.

19 THE COURT: All right.

20 MR. GAGE: Your Honor, to turn the clock back to
21 late July, we, we had received a pretty significant number
22 of requests for depositions. And we asked the plaintiffs'
23 lawyers -- and many of those requests were that the witness
24 be deposed before September 23 because that was then the
25 expert deadline.

1 And we asked in late July that the plaintiffs identify
2 their priority witness list and tell us which of the ones,
3 you know, needed to be deposed before 9-23 and which of the
4 ones could be deposed after 9-23.

5 So, on August 6th we received their priority list of 33
6 depositions. Nineteen of those were, were to be produced
7 before the September 23 deadline, and 14 additional
8 depositions were to be completed in the fall.

9 We were able to offer dates before 9-23 for 17 of the
10 19 first priority witnesses. We had, we had seven witnesses
11 scheduled to occur in the last week of July or the first two
12 weeks of August that were postponed at the plaintiffs'
13 request, and then showed up on that August 6th priority
14 list.

15 In other words, those depositions, those seven would
16 have been completed but for the plaintiffs' request to move
17 those depositions. As it stands now, I think two have gone
18 forward and they want more time with one of the -- with,
19 with an additional one.

20 Now, Your Honor, the August 6th date is important
21 because we considered that to be, you know, "Tell us really
22 who you've got left and what you need to do before we march
23 off to trial."

24 After August 6th, we have received requests for a
25 witness named Margareta Eriksson, Wanda Patire-Singer, and

1 we also received three new 30(b)(6) deposition notices.

2 After September 1 we received requests for three new
3 witnesses and another full day with an existing witness,
4 Gene Kammerer.

5 After September 15, just a couple weeks ago, we
6 received requests for Cary Linsky. And then we got a letter
7 last week for an additional nine or ten witnesses, new
8 witnesses.

9 So, Your Honor, where we are now is that there are
10 currently requests for 32 fact witness depositions that are
11 not continuations of existing depositions. And there are
12 also -- we've got a lot of depositions that are already
13 scheduled.

14 And, Your Honor, we are at the point where it is, it's
15 almost impossible to continue to accommodate this very large
16 number of additional requests for depositions, particularly
17 as close as we are getting to trial.

18 And, Your Honor, we have struggled internally as to
19 what, what should we do. And, and -- so, we -- after
20 thinking it through and talking it through, we, we came up
21 with a proposal.

22 And they have 32 -- they have requests for 32 fact
23 witness depositions. And we would request that they take --
24 they pick their top ten and say, "These are the ten that
25 we've really got to have," and then we will get on -- you

1 know, we will get those ten done. But facing 32 requests
2 right now is, is simply not possible between now and the end
3 of the year.

4 And, so, that's kind of where we find ourselves, Your
5 Honor.

6 THE COURT: How many total depositions have been
7 taken so far in this case?

8 MR. GAGE: Forty-one depositions have been taken.
9 And there are four more that are already hard sets, you
10 know, in terms of being scheduled. So, that would be a
11 total of 45.

12 THE COURT: Is that just fact witness depositions or is
13 that 30(b)(6) and fact witness?

14 MR. GAGE: That's fact witnesses only.

15 THE COURT: Okay.

16 MR. CARTMELL: Well, my numbers are a little
17 different than that. I think the number is actually --

18 THE COURT: Who, who is this speaking?

19 MR. CARTMELL: Oh, I'm sorry. I apologize. This
20 is Tom Cartmell.

21 THE COURT: Thank you.

22 MR. CARTMELL: Your Honor, my, my numbers, I
23 think, are accurate. And our numbers that we have are 42
24 depositions total. In two of those depositions, the MDL has
25 not asked a question. And, so, there's been requests for

1 additional days, or additional day in those for MDL.

2 And those include, those include actually the 30(b)(6)
3 depositions of Ms. Lynn (phonetic), Mr. Smith, Dan Lamont,
4 and I think -- oh, and Ms. Angelini. That's true. And if,
5 if I could respond, you know, briefly, and I think maybe --

6 THE COURT: Well, before you go on, let's, let me
7 try to figure this out.

8 So, Mr. Cartmell, you say 42 depositions have been
9 taken. And that includes both fact witnesses and 30(b)(6)
10 depositions?

11 MR. CARTMELL: Yes, Your Honor.

12 THE COURT: And Mr. Gage says 41 depositions have
13 been taken, and that only includes the fact witnesses. So,
14 --

15 MR. GAGE: Your Honor, I think the, the confusion
16 may be resulting from the fact that some of the fact
17 witnesses have also been deposed as 30(b)(6) witnesses.

18 THE COURT: So, the 41 includes fact witnesses and
19 30(b)(6) depositions.

20 MR. GAGE: Only if it -- only to the extent that
21 it's the same person who has later been deposed as a
22 30(b)(6). In other words, 41 people have been put up as a
23 fact witness.

24 THE COURT: How many additional depositions have
25 been taken of 30(b)(6) witnesses separate and apart from

1 these ones that are both?

2 MR. CARTMELL: This is Tom Cartmell. None, Your
3 Honor. There's no confusion.

4 THE COURT: Okay. So, --

5 MR. GAGE: But, Your Honor, they're not different
6 people, but they are different depositions.

7 THE COURT: But there's been 41 of them total.

8 MR. GAGE: No. If we were, if we were to add in
9 the 30(b)(6)s, the total would be higher than 41. And I've
10 got Donna Jacobs here, Your Honor, who helps us on, kind of
11 handles all the depo scheduling.

12 Donna, I don't know if we have an exact count, but --

13 MS. JACOBS: I did not make an exact count. I
14 just counted the people who have been deposed in their
15 individual capacities. At least four of those were also
16 deposed as 30(b)(6) designees under notices that were served
17 on the defendant.

18 THE COURT: Well, you can see why I have a problem
19 sometimes because I can't even get some of these basic facts
20 down. You disagree about some really simple things like the
21 number of people who have been deposed.

22 So, in any event, in addition to whether it's been 41,
23 45, or 42, you're telling me, Mr. Gage, that they have now
24 told you they want another 32 fact witnesses.

25 MR. GAGE: Yes, Your Honor, that's -- the numbers

1 that we tabulated, that's apparently what it looks like.

2 THE COURT: And do you agree with that,
3 Mr. Cartmell?

4 MR. CARTMELL: Your Honor, I have not looked, so I
5 couldn't agree.

6 MR. AYLSTOCK: Your Honor, this is Bryan Aylstock.
7 I'm looking at a couple of different letters here, but
8 a lot of these folks have been requested a long time ago
9 like, you know, what I just brought up, Mr. Kirkemo in
10 March, Ms. Kaminski in May.

11 These aren't -- there were certainly some new folks in
12 light of the new documents that were just produced in light
13 of the new testimony. And I would, I would say the new
14 folks, you know, were probably in the order of 15 or
15 something like that in addition to the old folks.

16 Then there are some folks like, for example, Joel
17 Lippman. Joel Lippman was the Chief Medical Officer for J&J
18 from July, 2000, to May of 2006.

19 Well, we haven't asked for his -- we may have asked for
20 his deposition now, but we had asked for his personnel file
21 and his custodial file months ago. And we still don't have
22 it.

23 So, for some of these, we're trying to get the file
24 before we ask for the deposition. For some of them, we
25 learn things about their involvement in one of the 11 or 13

1 different products, depending on how you look at laser cut
2 and mechanical cut.

3 And, so, there are certainly some more folks as we've
4 gone through the deposition process that we've identified
5 that we believe that we need for the 11 products that we
6 have to work up. And we're certainly prioritizing them.

7 We have limited resources, much more limited than
8 Johnson & Johnson. And we're not in any hurry to be away
9 from our families and be on the road doing depositions. But
10 certain things need to be done in particular.

11 And we're looking at the ones that are for the TVT
12 Retropubic case coming up. Some can be pushed into next
13 year. And we're willing to do that and work with that. But
14 the suggestion that somehow we're taking depositions
15 willy-nilly of people we don't need I vehemently disagree
16 with because I'd much rather be doing something else than
17 doing depositions. I know everybody feels that way.

18 MR. GAGE: Your Honor, --

19 MR. AYLSTOCK: This is the first time I've heard
20 any of this back and forth. Mr. Gage certainly didn't share
21 any of those numbers with us. And this is the first time
22 I've heard such a proposal out of his mouth. So, it's all
23 kind of new to me.

24 MR. GAGE: Your Honor, this is William Gage.

25 If I may respond just briefly, I think, you know,

1 really the straw that kind of broke the camel's back was the
2 letter that we got this past week where I think it was a
3 list of nine or ten new witnesses.

4 And, Judge, I'm not suggesting either implicitly or
5 explicitly that the plaintiffs are taking depositions they
6 don't rightfully believe they need to take. That's not my,
7 my point.

8 My point is that just given the limited time that
9 remains and the number of new requests that are coming in
10 and the, and the personnel resourcing issue, not to mention
11 the very complicated process of scheduling these depositions
12 and getting all the file productions in order, it's, it's
13 more than what can reasonably be accomplished given the time
14 remaining.

15 So, Your Honor, that's the spirit in which I make this,
16 make this proposal. It's, it's really just so many in such
17 a short period of time. And, and when we look at the
18 August 6th e-mail, you know, we thought we were saying,
19 "Guys, tell us who you really need for the fall and, and
20 let's get cracking on that."

21 And, and they sent us the e-mail. They gave us that
22 prioritization. But what's happened since then is so many
23 additional people have been added that by virtue of a timing
24 perspective, it's almost impossible to get it done.

25 THE COURT: Well, and I think one issue that comes

1 to mind again is your first trial will be just a TVT Classic
2 product. Correct?

3 MR. AYLSTOCK: Yes, Your Honor. This is Bryan
4 Aylstock.

5 THE COURT: And then the second round is going to
6 be a TVT-O?

7 MR. AYLSTOCK: Yes, that's correct, Your Honor.

8 THE COURT: So, looking at just those two
9 products, and bearing in mind that Ethicon is the one that
10 doesn't want to separate out the products, but, Mr. Gage,
11 you may need to do that in order to get the depositions
12 done, why don't you look at which of these witnesses you
13 need to depose for those products.

14 Now, maybe there aren't any that you can just separate
15 out for those products. I don't know. But if there are,
16 certainly those would go to the top of the list. If
17 there's -- if there are witnesses that are only on products
18 that aren't going to be set for trial for another year, I
19 don't understand why you can't put those at the very end of
20 your list.

21 MR. CARTMELL: Your Honor, this is Tom Cartmell.
22 I'll try to answer some of those questions.

23 Part of the reason that there has been some, you know,
24 changing around and in some respects, as Mr. Gage said,
25 requests by us to move the depositions from priority to

1 non-priority and moving them further into the fall in
2 November and December and things like that was if you
3 recall, we were originally on the fast track of not knowing
4 which case would go to trial first.

5 So, we were trying to complete TVT, TVT-O, TVT-S and
6 all the other product depositions in a period of time that
7 would allow our experts to give reports on each product.

8 As we progressed and we figured out -- or the Judge was
9 actually kind enough to tell us that we would have a TVT
10 product first, and then separated by some time and a
11 different Docket Control Order for TVT-O and TVT-S, we then
12 were willing to push back some depositions and change some
13 depositions over time.

14 And that's why some of these depositions that have been
15 originally marked as priority became non-priority at that
16 point.

17 So, we have already decided that for some TVT-O fact
18 witnesses, for some TVT-S fact witnesses, TVT laser cut,
19 and, and L and Blue and all these people, to take those
20 people off priority and not do them before an expert cutoff.

21 We also, though, -- and I have had multiple
22 conversations with Donna Jacobs and William Gage about this
23 as well as Christy. We talked about early on there not
24 being a deadline, a cutoff for discovery depositions at the
25 time of the experts.

1 So, I told them, "Look, I'm hoping and, and it sounds
2 like you guys understand, we are going to continue to take
3 depositions after the expert cutoff deadline because we have
4 to knock these out." And TVT-O will be following, you know,
5 shortly on the heels. We have expert reports that will be
6 due shortly after that.

7 So, although we won't make those necessarily priority,
8 we're still going to ask to take those depositions. And
9 those depositions, I believe -- I think it's hard to
10 believe, first of all, that there's 32. But some of those
11 may be TVT-O and TVT-S. And that's why we've asked for
12 those not in October, but in maybe November and December
13 and, frankly, you know, potentially having to go off also
14 maybe into the new year.

15 We, we are not -- I mean -- and the other thing I would
16 say, Your Honor, and -- in the last 60 days, I can get you
17 the number, but they have dumped an amazing amount of new
18 documents on us, mostly from people who have either been,
19 already deposed or for people that are new witnesses or new
20 documents that we're just discovering.

21 We've also had a half a dozen depositions, including
22 Dan Smith's multiple day, Angelini's, and some others, where
23 we have been told new issues, new things about the mesh, new
24 things about where the documents reside.

25 And, in fact, last week we had a conference call for

1 over an hour with Ms. Jacobs and Mr. Gage discussing how
2 they were searching around in the local entities in, in
3 Europe to try to find all these documents, talking to
4 certain witnesses.

5 And, in fact, during the deposition of Laura Angelini,
6 I got certain names of people. They were trying to find all
7 this information about the mesh and the agreements between
8 MedScand and things like that.

9 So, some of the new names come from in the last 30 days
10 of depositions and their witnesses specifically saying --
11 you know, Susanne Landgrebe, in fact, was the co-director of
12 this. So, she would have more information on that. So, we
13 sent out something saying, "We need to take Susanne
14 Landgrebe."

15 Now, I have given up -- I'm the scheduler. I'm the
16 depo scheduling guy. I feel like that's all I do. And I'm
17 sure Ms. Jacobs feels the same way. I've given up on the
18 idea of being able to get this stuff to our experts in time.
19 So, we are now into November and December depositions.

20 But this is information almost entirely that should
21 have been in our hands, again, months ago. I know you don't
22 want us to talk about that, and that's fine. But to say
23 that we get ten more depositions because, you know, somehow
24 we have delayed or somehow we have not done what we're
25 supposed to do is simply not fair.

1 And, so, we need this extra time to get these
2 witnesses' testimony, get these documents, the foundation
3 laid, and things like that that, frankly, we didn't get for
4 the last 60 days.

5 THE COURT: All right. Well, here's, here's what
6 I can say on this.

7 First of all, I think both sides need to put together a
8 list of the people that have already been deposed. And if
9 the same person has been deposed as a fact witness and as a
10 30(b)(6) witness, those, that's two separate depositions.

11 So, let's, let's put a list together so that we're all
12 working off the same list as to who's already been deposed.

13 Then let's see how many depositions are left to be done
14 and whether some of those need to be pushed to the front of
15 the list and some can be pushed to the end of the list.
16 That's something I think needs to be done.

17 I think probably one of the problems that's happening
18 here is that these lists of names are being sent out and
19 there's not really any prioritization that's happening with
20 these witnesses because the fact of the matter is there is
21 only a limited amount of time left. And I think it's -- it
22 behoooves everyone to get the people deposed who really need
23 to be deposed before your first trial takes place. So,
24 let's do that.

25 After you've made these lists and you've talked a

1 little bit about the order of these, of these deponents, if
2 you can't agree, then, then give the information to me and
3 I'll, I'll, I will make a decision as to how many
4 depositions can be taken, when, what time frame they need to
5 be taken in, and how many days you can take them.

6 Right now, you don't have any agreement one way or the
7 other. And when I listen to you-all talk, I can't make
8 heads or tails of who's been done, who hasn't been done.
9 It's so -- it's impossible for me sitting here to be at all
10 helpful to you.

11 I suggest you do that. Make some lists. I mean,
12 you're not even agreeing on the number of people that have
13 been deposed. You're not even agreeing on the number of
14 products in dispute. I've seen -- I've heard seven. I've
15 heard 11. I've seen 14. I've seen 15. I have no idea, to
16 be honest with you, how many products are in dispute and
17 what you're discovering on, on what number of products.

18 So, I think there needs to be, you know, a little bit
19 of organization on some of these simple matters. And then I
20 would be able to help you more.

21 There's going to be a limit to the number of
22 depositions you can take, though. You can't take 100
23 depositions. You just can't. So, you need to pick the
24 people you really need to depose.

25 And I understand what you're saying on the plaintiffs'

1 side. You're not wanting to just run around and take
2 depositions for fun. It's expensive. It's time-consuming.
3 It's, it's difficult, draining. So, I understand that.

4 But, you know, sometimes I think maybe in the whirlwind
5 of trying to get everything done, nobody is stepping back
6 and really looking at the whole picture and saying, you
7 know: "What do we really need to do to get ready for
8 trial?"

9 And you're about at the point now where you need to do
10 that because -- when is your trial? January or February?

11 MR. AYLSTOCK: February 10th, Your Honor. This
12 is Bryan Aylstock. And I --

13 THE COURT: We're talking about holidays coming
14 up. I mean, it's going to get tougher and tougher between
15 the end of November and the middle of December, the end of
16 December to get things done.

17 MR. AYLSTOCK: We hear you, Judge. This is Bryan
18 Aylstock.

19 And, and certainly there's a limit to, to our stamina
20 as well. It is -- this is a little different than, than the
21 other MDLs even in, in, before Judge Goodwin just with the
22 number of products and the, the span. But, but we hear you
23 on that.

24 THE COURT: Maybe some day someone will tell me
25 what the number of products is because I still don't know.

1 MR. AYLSTOCK: I think I might be able to clear
2 that up real quick, Judge. There are seven, seven TVT
3 products by name. That would be the TVT Classic, the TVT-S,
4 the TVT-A -- I'm sorry -- the TVT-O. Those are the three
5 main ones. Then there's a TVT-AA, a TVT EXACT, a TVT
6 ABBREVO, and a TVT-D.

7 What makes it a little -- and then there's four POP
8 products. There's Gynemesh PS, the Prolift, the Prolift+M,
9 and the Prosima.

10 What makes it complicated and why there's some
11 uncertainty is there was a switch, but not really a switch,
12 where certain of the TVT products went from a mechanical cut
13 or machine cut to a laser cut because they were losing
14 particles. And that's one of the issues in the case.

15 But they, they continued selling both products even to
16 this day. So, it depends on, you know, I guess what glasses
17 you have or how you want to look at it. But where --
18 mechanical cut versus laser cut certainly affects not only
19 the particle loss but the stretchability and other things.

20 So, I, I apologize for making it unclear.

21 THE COURT: No, that helps. That actually helps
22 me some.

23 Let me ask you-all, tell me what your needs are as far
24 as the conference calls we've been having. We're at the end
25 of the, of the calls that have been scheduled by the order.

1 Do you feel that you need more calls? And, if so, how
2 frequently do you want to have them?

3 I'm totally at your disposal. So, you just let me
4 know. If you don't think they're helpful, we, you know, it
5 won't offend me. We can stop having them. If you think
6 they're helpful, then we can have some more. Just tell me
7 how frequently you think we need to do them.

8 So, who, who would like to go first on that?

9 MR. AYLSTOCK: I could, Your Honor. This is Bryan
10 Aylstock. I, I -- they're very helpful and I apologize for
11 some of the back and forth we have on them if for no other
12 reason, there's a flurry of e-mails and proposals that
13 happens because neither of us want to come to Your Honor and
14 not have done our homework. So, just by virtue of that, I
15 think it's very important.

16 But your instruction and your availability is very
17 helpful to us. And I don't know that we necessarily need
18 them like another one this week. Maybe next Friday, a week
19 from Friday, and maybe go to a two-week rotation would be my
20 suggestion.

21 THE COURT: Mr. Gage, or someone on the defense.

22 MR. GAGE: Your Honor, this is William Gage. And
23 I concur with, with Bryan's comments. It has been very
24 helpful to have Your Honor available to us on a weekly
25 basis.

1 One of the things that we just literally kicked around
2 the last day or two, which we haven't even had a chance to
3 propose to Bryan yet, is that we start holding a one-hour
4 call with Bryan or his, or Tom or, or their delegees to
5 discuss discovery issues, kind of a standing one-hour call
6 every week.

7 THE COURT: Uh-huh.

8 MR. GAGE: And the plan would be, I think,
9 hopefully, Judge, that that call would then maybe give Your
10 Honor the ability to instead of having to meet with us every
11 week, maybe every other week or something like that.

12 THE COURT: That sounds like a great idea.

13 MR. GAGE: Okay. So, I think we're going to head
14 in that direction.

15 And the other thing, Your Honor, we're -- we -- you
16 know, we're still trying to get a face-to-face with, with
17 Mr. Aylstock. And he's been kind. He offered a date and
18 Tom couldn't and we just keep going around and around. But
19 we really hope that -- we think that's also a very important
20 part of the, of the puzzle because we've got a lot of things
21 we need to sit down with Bryan and Tom and talk about.

22 So, we're going to continue to press for a face-to-face
23 meeting. And I think that hopefully will help us on some of
24 the document issues.

25 THE COURT: I think that is very important. If

1 you could find some time -- I realize you're all very, very
2 busy. But if you could find some time to meet in person and
3 take a dedicated few hours, you might be able to work a lot
4 of these things out.

5 MR. GAGE: Your Honor, I have two -- I have a
6 couple of housekeeping matters that I just needed to provide
7 to Your Honor, and also perhaps to plaintiff, and to
8 plaintiffs' counsel.

9 THE COURT: All right.

10 MR. GAGE: First of all, it was mentioned
11 earlier -- and it may have been Bryan that mentioned it.

12 We were talking about Marianne Kaminski, and he
13 indicated that she was an Ethicon employee. I just didn't
14 want the hearing to close without noting for the record that
15 we were informed I think it was last week or maybe this -- I
16 guess last week that apparently she is no longer still with
17 the company. So, I just wanted the record to be clear on
18 that.

19 THE COURT: So, did Mr. Cartmell make her quit?

20 MR. CARTMELL: I haven't even had the chance to
21 talk to her yet, Your Honor.

22 UNIDENTIFIED SPEAKER: It's just a threat.

23 MR. GAGE: I have to tell you, Your Honor, the
24 other, the other issue that I wanted to mention to you was
25 some of the scheduling problems we've had with regards to

1 some of the witnesses. And it includes three of them,
2 Allison London Brown, Cheryl Bogardus, and Marianne
3 Kaminski. They have, they have each in their own way
4 reported to us, let's just say, problems with their prior
5 depositions. And that affected their willingness to provide
6 additional dates for more deposition dates.

7 And, so, it's been very difficult. We're going to pull
8 the transcripts of those three individuals and take a look
9 and see what happened, if anything. But that, that is an
10 issue that concerned my client a good bit. And it's one
11 that we're going to look into. And we'll get back with
12 Bryan if we see anything that we believe needs to be
13 addressed on a more formal basis.

14 MR. CARTMELL: Your Honor, this is Tom Cartmell.
15 Just for the record, I was not at any of those depositions.
16 And, in fact, for Ms. Brown I don't think the MDL had an
17 opportunity to ask a question.

18 MR. GAGE: I think that's correct.

19 THE COURT: And, you know, they need to understand
20 that if, if they don't work with you to get another date
21 that what's going to happen is they'll just be noticed and
22 subpoenaed, and they're not going to have the opportunity to
23 select a date that might be more convenient for them.

24 MR. GAGE: That's correct, Your Honor. We have
25 advised them of that.

1 The other couple things I need to -- well, just
2 relatively small issues, Judge. There are two issues, and I
3 don't believe Your Honor -- I'm not sure if Your Honor is
4 the appropriate person to handle these or not. I just would
5 request guidance from the Court.

6 The, the parties have been discussing some deadlines in
7 the Docket Control Order with regard to the new dates for
8 expert reports. Is that something that Your Honor would
9 refer us to Judge Goodwin on?

10 THE COURT: Yes. I would, I would definitely
11 start with Kate on that. Judge Goodwin would be the one who
12 would amend any scheduling order. So, that's just the way
13 it is in the Southern District of West Virginia. The
14 District Judges do manage their own scheduling orders. So,
15 you would need to contact Kate, and then she could talk to
16 Judge Goodwin for you I'm sure.

17 MR. GAGE: And, Your Honor, the other issue that I
18 needed some input on -- and I have not had a chance to raise
19 this with Bryan and I apologize for that. It just -- there
20 have been so many things people have been wanting me to put
21 on the agenda that it's hard to play traffic cop on all this
22 stuff.

23 But, but Your Honor may remember we've got this case
24 set for trial in February. It's the *Brown* case.

25 THE COURT: Right.

1 MR. GAGE: I'm sorry, the *Lewis* case.

2 THE COURT: The *Lewis* case.

3 MR. GAGE: The law firm that is involved in that
4 case is the, the Freese & Goss firm. And they're the ones
5 that -- I think that's their case. And we've had a
6 situation in, in one of Mr. Freese & Goss's State Court
7 cases in Texas where they have, they have issued deposition
8 notices for Ethicon employees on dates other than those
9 which have been accepted by, or -- well, they've already
10 been deposed in some cases, and they're wanting additional
11 dates that are different from the ones that MDL counsel are,
12 are giving us.

13 And the problem is Mr. Goss is on the Plaintiffs'
14 Steering Committee, and it's created a problem for us. And
15 I don't know whether that is an issue that we need to
16 raise -- I mean, I've got to get with Bryan on it. If we
17 can't get immediate assistance with Bryan on that, the
18 question for Your Honor is, is that something that's
19 supposed to come to Your Honor or is that something we
20 should take up with Judge Goodwin?

21 THE COURT: I guess it depends on what kind of
22 assistance you need. If it just has to do with the date,
23 then you would come to me. If it has to do with somebody
24 attending to the underlying problem, then that would
25 probably be Judge Goodwin.

1 MR. GAGE: Okay.

2 MR. AYLSTOCK: And, Your Honor, this is Bryan
3 Aylstock. I'm happy to reach out to them. This is the
4 first I've heard of any of this, you know. So, I understand
5 that.

6 And there is one -- and I know we're way over -- one
7 quick issue about one deposition if I could bring up to Your
8 Honor before we get off the phone.

9 THE COURT: Sure, sure. Go ahead.

10 MR. AYLSTOCK: It's about Gene Kammerer. He has
11 been an employee of J&J for decades, left in 2001. And he
12 was the individual who had indicated that he could be
13 deposed for three hours at a time. So, we did his
14 deposition. And ultimately I think on the record it was
15 probably two and a half hours because he took a break and
16 left and so forth.

17 He is critical to the material science part of the
18 case. He's a senior scientist. When he left, he was
19 engineering fellow. He's very critical with this particle
20 loss issue that I discussed, the pore size, the design
21 defect. He actually owns some of the patents on some of
22 these products. So, it's a very -- he's a very important
23 witness.

24 I understood prior to his deposition that he had some
25 medical condition that would only allow him to sit for three

1 hours at a time. So, we said, "Absolutely, we understand.
2 That's fine." We're not trying to put anybody, you know,
3 into discomfort.

4 But what ended up happening is we got two and a half
5 hours and now it's been -- we understood from, I think, a
6 conversation that happened off the record perhaps with the,
7 with somebody that he's got some degenerative disk disease.
8 And we understand that. And if he needs to stand up or take
9 breaks, we can bite off two hours at a time if we need to.

10 But we need more time with Mr. Kammerer. He's
11 indicated that he's, he's got some letter from a doctor that
12 says he, you know, is hurting or something. I don't know.
13 I haven't seen the letter. But we're going to notice his
14 deposition because he is so critical.

15 And I wanted to bring it to Your Honor's attention that
16 we've only had two and a half hours with, with this very
17 critical witness. And we need -- or we would like his
18 deposition in the very near future, and particularly in
19 light of the design defect aspects and how it might affect
20 the trial upcoming.

21 THE COURT: Now, Mr., Mr. Gage, what's the
22 situation with Mr. Kammerer? Is he -- or is it Kammerer?
23 What's his name?

24 MR. GAGE: It's Kammerer. His last name is
25 spelled K-a-m-m-e-r-e-r.

1 THE COURT: Oh, Kammerer. Okay. And is he a
2 former employee did I hear you say?

3 MR. AYLSTOCK: He is now, Your Honor. He left in
4 2011.

5 THE COURT: So, Mr. Gage, what kind of control do
6 you have over Mr. Kammerer? Can you work something out so
7 that they don't have to just notice him for some date that's
8 convenient for them?

9 MR. GAGE: Your Honor, I believe I reported last
10 week or the week before Mr. Kammerer in our conversations
11 with him has been very concerned about making himself
12 available for additional deposition time because of his
13 condition.

14 We obviously told Mr. Kammerer that these sorts of
15 things generally require some input from a physician,
16 sometimes a letter, sometimes, you know, other, other
17 methods.

18 And he obtained a letter from his physician. I
19 received that letter -- another lawyer in my firm received
20 it Saturday afternoon. I received it last night at
21 9:34 p.m. And I didn't check e-mails until this morning.

22 And the question in my mind was whether the letter was
23 something that I could send to plaintiffs' counsel or to the
24 Court because the letter did, in fact, discuss his medical
25 condition with some, some level of specificity.

1 So, my lawyer, Chad Hutchinson, here at the firm called
2 Mr. Kammerer to get his position as to whether or not I
3 could give that letter to both the Court and to plaintiffs'
4 counsel. And Mr. Kammerer advised Mr. Hutchinson that he
5 believes his health conditions are private. And he, he gave
6 us limited authority to disclose the letter to the Court
7 only. So, Your Honor, --

8 THE COURT: Well, I think the problem here is if
9 you look at the case law, unless somebody is on their death
10 bed or has severe dementia or Alzheimer's, they generally
11 are not excused from a deposition even if they have some
12 sort of medical problem.

13 What, what will happen is that accommodations will be
14 made so that he isn't, his health isn't jeopardized. But
15 the likelihood that he's not going to have to testify
16 anymore, it's not great.

17 I suggest that perhaps you talk to him about the fact
18 that, you know, the plaintiffs are willing to work with him
19 as far as spreading this out over several days, a few hours
20 a day, but he's, he's not going to be able to avoid it
21 unless he has a very, very serious medical problem.

22 And you know what will also happen is if they subpoena
23 him and he makes a motion to quash the subpoena, he's going
24 to have to produce the medical evidence because no court is
25 going to excuse him from anything unless they've seen the

1 medical evidence.

2 So, you might want to talk to him, Mr. Gage.

3 MR. GAGE: We will, Your Honor.

4 THE COURT: Nobody wants to be deposed. But the,
5 but the reality is he's likely to be deposed more than he's
6 already been. So, he ought to try to do it on his own, you
7 know, on his own terms if he can. But one of those terms
8 can't be that there won't be any more depositions because
9 there's clearly going to be.

10 MR. GAGE: Understood, Your Honor. Thank you.

11 MR. AYLSTOCK: Thank you, Judge. I appreciate all
12 the time you gave us today.

13 THE COURT: Certainly. I appreciate you-all too.
14 And I'll, I'll issue a new schedule for some additional
15 status conferences starting on October 11th setting them two
16 weeks apart. And I'll still aim for 2:00 unless somebody
17 finds that to be not a convenient time.

18 Would you prefer mornings or do you, do you think
19 afternoons work just as well?

20 MR. AYLSTOCK: I think afternoons are fine, Judge.

21 THE COURT: All right, okay. Well, thank you
22 then. I will get an order out in the next day or two. And
23 I will talk to you in a week and a half or so.

24 MR. AYLSTOCK: Thank you so much.

25 THE COURT: Thank you. Bye-bye.

1 (Proceedings concluded)

2 * * * * *

3

4

5

6

7

8 I, Lisa A. Cook, Official Reporter of the United
9 States District Court for the Southern District of West
10 Virginia, do hereby certify that the foregoing is a true and
11 correct transcript, to the best of my ability, from the
12 record of proceedings in the above-entitled matter.

13

14

15 s\Lisa A. Cook

October 2, 2013

16 Reporter

Date

17

18

19

20

21

22

23

24

25